APPENDIX

May 28, 1962

Memorandum

This is an action to require the defendant Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950 to pay a pension to the plaintiff.

Plaintiff is a former miner. He retired from or ceased work in the bituminous coal industry on June 26, 1953. His application for pension was filed with the Trustees on or after July 7, 1953. The defendants denied plaintiff's application for pension on the grounds that he was not eligible for a pension in that he had not completed 20 years service in the coal industry within the 30-year period immediately preceding his application for pension. Admitted in evidence are the Trustees' record and files, and the Court finds and concludes from that evidence and the other evidence presented at the trial that there is substantial evidence to sustain the decision of the Trustees.

Prior to January 29, 1953, the rules for eligibility promulgated by defendant Trustees under the terms of the Trust Agreement provided, among other things, that a miner was eligible for a pension if he had completed 20 years of service in the coal industry. There was no restriction as to the period of time in which those 20 years of service had to be completed. Plaintiff contends that the amendment of the eligibility rules in January, 1953, was illegal as to him because they retroactively increased the eligibility requirements at a time when he had already completed 20 years of service in the coal industry. The Court concludes that at the time of the amendment of the eligibility rules, plaintiff was not eligible for a pension in that he had not retired from or ceased work in the bituminous coal industry as required by the eligibility rules before amendment.

Plaintiff also contends that he had filed an application for pension in December, 1952, prior to the January, 1953, amendment of the rules of eligibility. The evidence shows that the most that plaintiff did was have an application for pension prepared with the assistance of the financial secretary of his local union, but that the same was never filed with the defendant Trustees. Until plaintiff had retired from or ceased work in the coal industry and had filed his application for pension with defendant Trustees, he was not eligible for a pension.

There is no evidence of arbitrary or capricious conduct on the part of defendants. Under all the circumstances, the Court concludes that plaintiff has failed to maintain his burden of proof in this case, and the Court finds for defendants upon the basis of the evidence considered at the trial.

The Court does not reach questions raised by the defendants relating to the statute of limitations and laches and it does not pass upon those matters of defense.

Judgment for defendants. This memorandum of decision shall serve as the findings of fact and conclusions of law under Rule 52 F.R. Civ. P. Counsel will present appropriate order.

s/ WILLIAM B. JONES
William B. Jones
United States District Judge

May 28, 1962

Filed

Order

This cause having come on to be heard before the Court without a jury, and the Court having heard and considered all of the evidence adduced in open Court by the Plaintiff and the Defendant Trustees, and the Court having heard

argument by counsel for all parties in open Court, and the Court having filed a Memorandum Decision constituting its findings of fact and conclusions of law, it is, by the Court, this 11th day of June, 1962,

ORDERED, That Plaintiff's Amended Complaint be and the same is hereby dismissed with prejudice.

s/ WILLIAM B. JONES
Judge

Opinion

(Cited as 319 F. 2d 744)

U. S COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,229

JOHN KOSTY, APPELLANT

v.

JOHN L. LEWIS, ET. AL., Trustees, United Mine Workers of America Welfare and Retirement Fund of 1950, APPELLEES

Appeal from the United States District Court for the District of Columbia

Decided May 23, 1963

Mr. Louis Rabil, with whom *Mr. Joseph M. Stone* was on the brief, for appellant.

Mr. Edward L. Carey, with whom *Messrs. Pal J. Mitch* and *Charles L. Widman* were on the brief, for appellees.

Before BAZELON, Chief Judge, and BURGER and MCGOWAN, Circuit Judges.

MCGOWAN, *Circuit Judge*: A problem arising in the administration of the United Mine Workers of America Welfare and Retirement Fund of 1950 is the subject of this appeal. It is prosecuted by a member of the union who

brought suit to compel the payment of a retirement pension which the Trustees of the Fund had denied him. After a trial to the District Court, his action was dismissed. An understanding of the issues to be resolved requires an examination of (1) the nature and origin of the Fund, including the provisions made for its administration, (2) the circumstances of the appellant in relation to his claim of eligibility for a pension, and (3) the function and scope of judicial review in a matter of this kind.

I

The creation of the Fund in the first instance was dependent upon the benevolent regard of Congress, as manifested by the following exempting provision in Section 302(c) of the Labor Management Relations Act of 1947,[1] which authorizes the establishment in the coal industry of welfare funds.

> "(c) . . . for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, that (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer. . . ."

[1] 61 Stat. 157, as amended 73 Stat. 537, 29 U.S.C. § 186.

Pursuant to this statutory authorization, a subsequent collective bargaining agreement—the National Bituminous Coal Wage Agreement of 1950—brought the Fund into being, expressly denominating it to be "an irrevocable trust created pursuant to Section 302(c) of the 'Labor-Management Relations Act, 1947,'" to endure "as long as the purposes for its creation shall exist." The purposes specified include the payment of pension benefits on retirement of employees. The source of revenues for these purposes was the payment into the Fund by the Mine operators of 30¢ in respect of each ton of coal produced. Responsibility for operation of the Fund was placed in a Board of Trustees consisting of one representative of the United Mine Workers of America, one representative of the coal operators, and one neutral selected by the other two. The Trustees were directed to designate a portion of the revenues received for use in providing pensions, but a substantial measure of discretion, with respect to pension as well as other benefits, was lodged in the Trustees in these terms:

> "Subject to the stated purposes of this Fund, the Trustees shall have full authority, within the terms and provisions of the 'Labor-Management Relations Act, 1947,' and other applicable law, with respect to questions of coverage and eligibility, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provisions for benefits, investment of trust funds, and all other related matters."

At their second meeting on April 5, 1950, the Trustees adopted Resolution No. 10, providing a monthly pension for retired employees. Resolution No. 10 promulgated regulations (stated to be "subject to amendment, revocation and revision at the discretion of the Trustees") prescribing eligibility requirements and covering other administrative aspects of the pension system. In order to be eligible, an applicant for a pension was required to have (1) at

tained the age of 60, (2) retired by permanently ceasing work in the Bituminous Coal Industry after May 28, 1946, (3) been employed for at least one year immediately preceding his retirement, and (4) completed 20 years of service in the Coal Industry.

In January 28, 1953, the Trustees adopted Resolution No. 30, which superseded Resolution No. 10 as the governing regulation with respect to pension eligibility requirements. The new resolution was made effective forthwith, that is to say, January 29, 1953. The significant change which it made, for purposes of this proceeding, was to prescribe that the requisite 20 years of service must have taken place within the 25-year period immediately preceding the filing of a pension application. A few weeks later, on March 13, 1953, the Trustees, by Resolution No. 31, amended Resolution No. 30, retroactively effective as of January 29, 1953, by enlarging from 25 to 30 years the period immediately preceding application within which the 20 years of service must have occurred. This change was perpetuated in a further amending resolution, No. 32, adopted by the Trustees on May 12, 1953.

II

The appellant, at the age of 65 years and five months, retired on June 26, 1953, and promptly thereafter filed his application for a pension on the form provided by the Fund. The application recited a total of over 31 years of service in the coal industry, comprised of two non-consecutive periods. The first of these was from 1906 to 1924 as an employee of Bethlehem Mines Corporation; the second was from 1940 to 1953 as an employee of Stineman Coal & Coke Company.

The administrative files of the Fund relating to this application, which were put in evidence in the District Court, showed that appellant's application was denied for the reason that it did not appear that appellant had had 20

years of service in the 30-year period immediately preceding the filing of the application, as required by Resolution No. 39, as amended. The record suggests that efforts were made over a long period of time, both by the appellant and by others on his behalf, to persuade the Trustees to alter their decision, but these efforts were unavailing and the suit in the District Court was instituted.

The appellant's second period of employment—from 1941 to 1953—was conceded by the Trustees, but, in response to interrogatories, the Trustees stated that they had no information as to whether appellant had or had not been employed as a coal miner from 1906 to 1924. At the trial appellant testified at length with respect to this first period of employment, stating that it had ended because he had received an injury in the course of his employment. This testimony was corroborated by that of another miner who had worked with appellant at the same mine throughout the entire period from 1906 to 1924. The Trustees offered no evidence of any kind contradicting this testimony, and made no effort to impeach the witnesses on this point.

The trial judge found that Resolution No. 10 imposed "no restriction as to the period of time in which those 20 years of service had to be completed." This finding seems fully justified by the language of Resolution No. 10, and the Trustees make no contrary contention. Since appellant was over the age of 60 at the time Resolution No. 10 was adopted, he could have qualified for a pension thereunder at any time by a simple election to stop working. He was not bound to do so, however, because Resolution No. 10 did not impose any requirement that an employee, otherwise qualified for a pension thereunder, was obligated to terminate his employment and take his pension.

The record shows explicitly, from the testimony of the neutral Trustee, that no notice of any kind was given by the Trustees of their purpose to change the eligibility re-

quirements. As has been noted, the amending resolution was effective immediately upon its adoption. Thus, appellant, at the age of 65, found his existing eligibility abruptly terminated, and he was confronted with the necessity of amassing approximately 8½ years additional service in order to qualify under the new rule.[2] The trial judge concluded that, under these circumstances, there was no evidence of arbitrary or capricious conduct on the part of the Trustees, *vis-a-vis* the appellant, and that his claim for relief had not been established.

III

The trial judge correctly concluded that the issue presented to him was whether the Trustees' action was arbitrary or capricious in relation to the appellant in the light of the facts adduced. This conclusion is fully in accord with the definition of the scope of judicial review articulated by this Court in *Danti* v. *Lewis*, —— U.S.App.D.C. ——, 312 F.2d 345 (1962). Both in that case and in this the Trustees have accepted the appropriateness of this definition, and, accordingly, we need not consider any contention that there is no power whatsoever in a court to interfere in any way with the Trustees in their administration of the Fund. It could not be otherwise. The institutional arrangements creating this Fund and specifying the purposes to which it is to be devoted are cast expressly in fiduciary form;[3] and the Trustees, like all fiduciaries, are subject to judicial correction in a proper

[2] The application filed by appellant stated "illness" as a reason for retiring. This fact, when considered in conjunction with appellant's advanced age, underscores the magnitude of the adverse effect upon appellant wrought by the change in the years-of-service requirement.

[3] See *Lewis* v. *Benedict Coal Corporation*, 361 U.S. 459 (1960). The statutory authority for the Fund is given in trust terms, and the parties to the instruments creating it adhered rigorously to this terminology. Appellant's suit, therefore, is one to establish his status and rights as a beneficiary.

case upon a showing that they have acted arbitrarily or capriciously towards one of the persons to whom their trust obligations run.

IV

The question before us, then, is: Was the court below right in determining, on the facts of record, that the abrupt alteration by the Trustees of the eligibility requirements was not an arbitrary or capricious action in its impact upon appellant?

Counsel for appellant have pressed two principal contentions upon us as warranting reversal of the decision of the District Court. One is couched in terms of "vested rights," and consists of the claim that appellant, prior to the adoption of the revised eligibility requirements, had possessed in substance fully matured rights entitling him to a pension, and that these rights could not lawfully be divested. Essential to this argument is the assertion that that element of eligibility in Resolution No. 10 involving actual retirement from work is not to be placed in the same scale with the other requirements, such as length of service and age—that it should be regarded as a "procedural rule" rather than one of a substantive character, and thereby be waived or disregarded in appraising the degree to which pension rights have become vested in one who meets all of the other standards laid down as essential to eligibility.

In the view we take of the case, however, we find it neither necessary nor illuminating to approach the problem by reference to these well-worn legal slogans.[4] We recognize that the Trustees have been accorded wide latitude in specifying from time to time *what* the eligibility qualifications shall be. Our concern is, rather, with *how*

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[4] *Danti* v. *Lewis*, *supra*; *compare Ruth* v. *Lewis*, 166 F. Supp. 346 (D.D.C. 1958), *with Hobbs* v. *Lewis*, 159 F. Supp. 282 (D.D.C. 1958); *cf. Kennet* v. *United Mine Workers of America*, 183 F. Supp. 315, 317-18 (D.D.C. 1960).

changes in the qualifications are made. Stated another way, our interest here is directed to the reasonableness of the opportunity afforded to mature pension eligibility under current standards where all that is lacking is the actual termination of employment rather than in debating whether such eligibility should be regarded in substance as already having been matured.

This brings us to appellant's second major contention, which is that the Trustees acted arbitrarily in altering the eligibility requirement in respect of years of service without prior notice of any kind or the provision of an opportunity rationally calculated to give appellant an opportunity to elect between taking his pension or continuing in employment subject to the new requirement. It is clear from the nature of the testimony given by the neutral Trustee at the trial that the Trustees felt themselves under no obligation of any kind in this regard. This testimony was simply that no notice of any kind was afforded, which is another way of saying that the Trustees looked upon employees situated as was appellant as continuing to work in the coal industry at their peril in terms of the possibility that pension eligibility might be wiped out for all practical purposes at any moment by the sudden action of the Trustees in changing the requirements. We do not believe that the concededly broad grant of authority to the Trustees was this broad.[5] To hold otherwise would

[5] In the *Danti* case, *supra*, the employee had retired and filed his application prior to the adoption of Resolutions Nos. 30 and 31, but it was not considered until Resolution No. 30 was in effect. Although possessing 20 years of service in all, these years did not fall entirely within the 30-year period immediately preceding retirement. This Court held that it was arbitrary for the Trustees to reject the application for failure to meet the changed standard. There, however, the Trustees on reconsideration again rejected the application on the ground that the employee had failed to qualify under another requirement of Resolution No. 10, and the resolution of that issue was necessarily involved in the decision of that case. No such claim is made by the Trustees here.

make this particular grant wholly out of harmony with the other features of the trust agreement, which reflect the fiduciary character of the responsibilities devolved upon the Trustees in respect of employees who had devoted substantial segments of their lives to the coal industry.

We do not deny the authority of the Trustees to revise pension eligibility requirements in the light of their experience. Flexibility of this kind seems especially necessary for the operation of this Fund, tied as it is to the fluctuating fortunes of the coal industry. But trial and error, where trust relationships are involved, operate within some limitations of fundamental fairness. These were, in our judgment, exceeded here by the failure of the Trustees to accord any notice or period of grace which would have afforded some reasonable possibility for an employee like appellant to have elected to retire and take the pension available immediately prior to the change.[6] We do not say that actual notice to each employee of his opportunity so to elect would be necessary to defeat a claim, since there may be problems of identification and communication which the Trustees may not be able to overcome in every case, although no point of this kind is made on their behalf in the record of this case. We do say that it was clearly not beyond the capacity or resources of the Trustees to have devised some system of publicity for the impending change which reasonable men would regard as having fulfilled their fiduciary undertakings. To have made no effort at all in such direction entitled this appellant to claim with reason that he has been exposed to arbitrary and capri-

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[6] *Compare International Union of Electrical, Radio and Machine Workers* v. *NLRB*, 113 U.S. App. D.C. 342, 307 F. 2d 679, *cert. denied* 371 U.S. 936 (1962). There, this Court, in a different, but not wholly unrelated context, remarked upon "the obligation of fair dealing which includes the duty to inform the employee of his rights and obligations so that the employees may take all necessary steps to protect his job."

cious action by those who owed him adherence to a different—and higher—standard of conduct.

V.

Since the District Court dismissed appellant's claim because it found no arbitrary and capricious action on the part of the Trustees, the decision below is reversed. Because of the completeness of the present record and considering the nature of the case, further proceedings at the trial level are not justified. 28 U.S.C. § 2106 grants this Court broad discretion in the disposition of a case on appeal:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Where the evidence of record points in only one direction, as here, justice does not require this Court to remand a case for the record to be reopened.[7]

Since we have found that the changed eligibility requirements cannot apply to this appellant because the Trustees acted in an arbitrary and capricious manner, appellant's pension eligibility is governed by Resolution No. 49. Appellant's employment from 1941 to 1953 was conceded; and the evidence of appellant's employment from 1906 through 1924 was not only uncontradicted but the Trustees expressly admitted that they had no evidence to rebut it. Reopening the proceedings thus would serve no useful pur-

[7] See *Tinder v. United States*, 345 U.S. 565 (1953), and *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940).

pose. Appellant met the requirements of Resolution No. 19, and he is entitled to his pension from the date of his retirement.

There remain to be considered two affirmative defenses which the trial judge did not reach, namely that the statute of limitations and laches bar the present action. Ordinarily, resolution of these issues should be made by the trial judge in the first instance. However, the record itself completely negates both defenses. Indeed, the defense of laches was not directed to the issues which we find to be controlling. Rather, it was urged as a bar to two alternative theories of recovery advanced by appellant at the trial, *i.e.*, that he had actually fulfilled the requirement of twenty years of service in the coal industry within thirty years preceding retirement; and that he had filed an application for pension in December of 1952, prior to the effective date of the new regulations, which application could not be found. We agree with the skepticism shown by the trial judge during oral argument as to the merits of this defense.[8] Since, however, laches goes only to two matters which are not determinative in our view of the case, we need give the defense no further consideration.

Turning to the defense that the statute of limitations barred the present action, this Court has previously held that equity does not necessarily follow the statutory period of limitations.[9] We will assume, however, that defendants were correct in their assertion that the applicable limi

[8] See Transcript of Proceedings, pages 59[illegible]-94. For laches to be a valid defense, the defendant must show an undue and unexcused delay which caused prejudice to the preparation of the defense. *See Southern Pacific Co.* v. *Bogert*, 250 U.S. 483 (1919); *Major* v. *Shaver*, 88 U.S. App. D.C. 148, 187 F. 2d 211 (1951); *United States* v. *Moreau*, 87 U.S. App. D.C. 84, 182 F. 2d 986 (1950).

[9] Haliday v. Haliday, 56 App. D.C. 179, 11 F. 2d 565 (1926); *cf. Naselli* v. *Millholland*, 89 F. Supp. 943 (1950), *aff'd* 88 U.S. App. D.C. 237, 188 F. 2d 1005 (1951).

would be three years from the date a cause of action "accrued."[10] The Trustees urged that appellant's cause of action accrued in September of 1953, when his application was first turned down. This argument we cannot accept. Appellant was a beneficiary of an express trust. Numerous courts have held that in order to start the statute of limitations running against an express trust, there must be a clear and continuing repudiation of the right to trust benefits.[11] The administrative file, which was introduced into evidence by the Trustees themselves, is replete with documentary evidence showing that the case was still not closed in 1960, when this action was commenced. At least three different investigations were made by the Trustees into the merits of appellant's claim for a pension. One was conducted in 1957, and a final one when this action was begun. Until a defense was interposed in this case, we cannot say that appellant's claim was completely repudiated. Until that time, the Trustees were giving continuing consideration to appellant's eligibility. On these undisputed facts, this action is not barred by the statute of limitations.

The case is remanded to the District Court with directions to enter judgment for the appellant in accordance with this opinion.

[10] D.C. Code § 12-201: "... and no action the limitation of which is not otherwise specially prescribed in this section shall be brought after three years from the time when the right to maintain any such action shall have accrued."

[11] See, *e.g.*, *Haliday v. Haliday*, *supra*; *Frazary v. Fitzpatrick*, 21 Cal. 2d 851, 136 P. 2d 566 (1943); *Hill v. Irons*, 92 Ohio App. 141, 109 N.E. 2d 699 (1952), *rev'd on other grounds*, 160 Ohio St. 21, 113 N.E. 2d 243 (1953); *Howell v. Wilson*, 323 S.W. 2d 61 (Tex. Civ. App. 1959).

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1950

Effective March 5, 1950, to June 30, 1952

Executed at Washington, D. C., March 5, 1950

* * * * * * * * * *

United Mine Workers of America Welfare and Retirement Fund of 1950

A. It is hereby stipulated and agreed by the contracting parties hereto that there is hereby created a Fund to be designated and known as the "United Mine Workers of America Welfare and Retirement Fund of 1950." During the life of this Agreement, there shall be paid into such Fund by each operator signatory hereto the sum of thirty cents (30¢) per ton of two thousand (2,000) pounds on each ton of coal produced for use or for sale. Such Fund shall have its place of business in Washington, District of Columbia, and it shall be operated by a Board of Trustees, one of whom shall be appointed as a representative of the Employers, one of whom shall be appointed as a representative of the United Mine Workers of America, and one of whom shall be a neutral party, selected by the other two. In the event of resignation, death, inability or unwillingness to serve, of the Trustee appointed by the Operators or the Trustee appointed by the United Mine Workers of America, the Operators shall appoint the successor of the Trustee originally appointed by them and the United Mine Workers of America shall appoint the successor of the Trustee originally appointed by it.

The Operators signatory hereto do hereby appoint Charles A. Owen, of New York City, as their representative on said Board of Trustees. The United Mine Workers of America do hereby appoint John L. Lewis, of Washington, D. C., as its representative on said Board of Trustees. It is further stipulated and agreed by the joint contracting parties that Josephine Roche, of Denver, Colorado is appointed as the neutral Trustee. Said three Trustees so

named and designated shall constitute the Board of Trustees to administer the Fund herein created.

In the event of a deadlock on the designation or agreement as to any future neutral Trustee; an impartial umpire shall be selected either by agreement of the two Trustees; representatives of the contracting parties hereto, or by petition by either of the contracting parties hereto to the United States District Court for the District of Columbia for the appointment of such an impartial umpire, all as made and provided in Section 302 (c) of the "Labor-Management Relations Act, 1947."

It is agreed by the contracting parties hereto that the Trustees herein provided for shall serve for the duration of this contract and as long thereafter as the proper continuation and administration of said trust shall require.

It is agreed that this Fund is an irrevocable trust created pursuant to Section 302 (c) of the "Labor-Management Relations Act, 1947," and shall endure as long as the purposes for its creation shall exist. Said purposes shall be to make payments from principal or income or both, of (1) benefits to employees of said Operators, their families and dependents for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or life insurance, disability and sickness insurance or accident insurance; (2) benefits with respect to wage loss not otherwise compensated for at all or adequately by tax supported agencies created by federal or State law; (3) benefits on account of sickness, temporary disability, permanent disability, death or retirement; (4) benefits for any and all other purposes which may be specified, provided for or permitted in Section 302 (c) of the "Labor-Management Relations Act, 1947," as agreed upon from time to time by the Trustees including the making of any or all of the foregoing benefits applicable to the individual members of the United Mine Work-

ers of America and their families and dependents, and to employees of the Operators other than those exempted from this Agreement; and (5) benefits for all other related welfare purposes as may be determined by the Trustees within the scope of the provisions of the aforesaid "Labor-Management Relations Act, 1947." Subject to the stated purposes of this Fund, the Trustees shall have full authority, within the terms and provisions of the "Labor-Management Relations Act, 1947," and other applicable law, with respect to questions of coverage and eligibility, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provisions for benefits, investment of trust funds, and all other related matters.

The aforesaid Trustees shall designate a portion (which may be changed from time to time) of the payments herein provided, based upon proper actuarial computations, as a separate fund to be administered by the said Trustees herein described and to be used for providing for pensions or annuities for the members of the United Mine Workers of America or their families or dependents and such other persons as may be properly included as beneficiaries thereunder.

It is further agreed that the detailed basis upon which payments from the Fund will be made shall be resolved in writing by the aforesaid Trustees at their initial meeting, or at the earliest practicable date that may by them thereafter be agreed upon.

Title to all the moneys paid into and or due and owing said Fund shall be vested in and remain exclusively in the Trustees of the Fund, and it is the intention of the parties hereto that said Fund shall constitute an irrevocable trust and that no benefits or moneys payable from this Fund shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, and any attempt so to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge the same shall

be void. The moneys to be paid into said fund shall not constitute or be deemed wages due to the individual mine worker, nor shall said moneys in any manner be liable for or subject to the debts, contracts, liabilities or torts of the parties entitled to such money, i.e., the beneficiaries of said Trust under the terms of this Agreement.

The obligation to make payments to the "United Mine Workers of America Welfare and Retirement Fund of 1950" under this contract shall become effective on March 6, 1950, and the first actual payments are to be made on April 10, 1950, and thereafter continuously on the 10th day of each succeeding calendar month covering the production of all coal for use or sale during the preceding month.

It is stipulated and agreed by the contracting parties hereto that the Trustee designated by the United Mine Workers of America shall be the Chairman of the Trustees of the Fund provided for in this Agreement.

It shall be the duty of the Operators signatory hereto, and each of them, to keep said payments due said Fund, as hereinabove described and provided for, current and to furnish to the United Mine Workers of America and to the Trustees hereinabove designated a monthly statement showing the full amount due hereunder for all coal produced for use or for sale from each of the several individual mines owned or operated by the said Operators signatory hereto. Payments to said Fund shall be made by check payable to "United Mine Workers of America Welfare and Retirement Fund of 1950" and shall be delivered or mailed to the office of said Fund located at 907 Fifteenth Street, N. W., Washington, D. C., or as otherwise designated by the Trustees.

SECOND MEETING OF THE TRUSTEES, UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950, APRIL 5, 1950

Resolution No. 10

WHEREAS, the United Mine Workers of America Welfare and Retirement Fund of 1950 has for one of its purposes the payment of pensions to individual members of the United Mine Workers of America, and to employees of the coal operators signatory to the National Bituminous Coal Wage Agreement of 1950 (hereinafter referred to as the "1950 Agreement") other than those exempted from the 1950 Agreement; and

WHEREAS, the Trustees desire to authorize the continuation of pension payments of ONE HUNDRED DOLLARS ($100.00) per month to pensioners whose applications have been approved by the Trustees of the 1947 Fund, and to adopt regulations to govern the payment of pensions hereafter;

NOW THEREFORE BE IT RESOLVED, that the Director be and is hereby authorized to continue payment of ONE HUNDRED DOLLARS ($100.00) per month to pensioners whose applications have heretofore been approved by the Trustees of the 1947 Fund in full force and effect, subject to Paragraphs III and IV of the regulations hereinafter provided, the first payment being for the month of June, 1950 or as soon thereafter as practicable, and shall be subject to amendment, revocation and revision at the discretion of the Trustees;

BE IT FURTHER RESOLVED, that the following regulations shall govern the payment of pensions of ONE HUNDRED DOLLARS ($100.00) per month to individual members of the United Mine Workers of America, and to employees of the coal operators signatory to the 1950 Agreement other than those exempted from said Agreement, and shall be subject

amendment, revocation and revision at the discretion of the Trustees.

1. ELIGIBILITY

An applicant shall be eligible for a pension if he meets the following requirements:

A. Attained the age of sixty (60) years or over at the time of his application for pension.

B. Retired by permanently ceasing work in the Bituminous Coal Industry after May 28, 1946.

C. Been employed for a period of at least one year in the Bituminous Coal Industry immediately preceding his retirement.

D. Completed twenty (20) years service in the Coal Industry in the United States, its possessions or territories, or the Dominion of Canada; a year of service being one in which applicant has for more than six months in any calendar year:

1. Worked in a job classified in any National Coal Wage Agreement for an employer in the Coal Industry.

2. Rendered service as an employee of the United Mine Workers of America in the Coal Industry and is not eligible for a pension under the United Mine Workers of America pension or retirement plan.

3. Served in the military service of the United States in any war or national emergency.

Any applicant who meets all requirements of eligibility at any time after May 28, 1946, shall not be subsequently disqualified by returning to work in the Coal Industry for a period of less than one year.

II. Proof of Eligibility

A. Age

1. Wherever possible the age of applicant will be verified by the Social Security Administration records.

2. Applicant shall be required to submit documentary evidence of probative value to establish his age in cases where the Social Security Administration records do not verify his age as stated on the application for pension.

B. Service

1. The following statements shall be deemed satisfactory proof of service for the period or periods covered by such statements:

a. Certification by a Local Union or by Local Unions, or by Districts of the United Mine Workers of America that an applicant served in the Coal Industry.

b. Statements by persons who have personal knowledge of applicant's service in the Coal Industry.

c. Certified copy or photostatic copy of discharge from a branch of the Defense Department of the United States or statements from the appropriate branch of the Defense Department.

C. The burden of proving eligibility shall be on the applicant.

I. PAYMENTS

A. General

Payments to pensioners shall be as follows:

1. First payment shall be for the first month after authorization of pension.

2. Last payment shall be for the month in which pensioner dies.

3. Payments shall be payable on the first day of each month at pensioner's last address of record.

B. Suspension

No payment shall be made for any month in which pensioner:

1. Does not reside within the continental limits of United States, its territories or possessions, or the Dominion of Canada.

2. Performs compensated services for an employer in the Coal Industry.

3. Fails to continue to meet requirements of eligibility.

V. FALSE STATEMENTS

Any Applicant for a pension who knowingly and willfully falsifies any records or makes any false misrepresentations or statements or withholds any information in order to secure a pension or to continue to receive a pension from the Fund shall be barred from receiving any benefits from the Fund; and in any case where payment has been made as a result of such misrepresentations or omissions the individual involved will be required to reimburse the Fund in the amounts he received from the Fund.

BE IT FURTHER RESOLVED, That the Director is hereby authorized and directed to activate this Resolution in accordance with its terms and conditions and is empowered to do all things, to perform all necessary acts, and to require the submission of evidence in order to effectuate the purposes of this Resolution.

TWENTY FIRST MEETING OF THE BOARD OF TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950, JANUARY 29, 1953

Resolution No. 30

PENSION

WHEREAS, the United Mine Workers of America Welfare and Retirement Fund of 1950 has for one of its purposes the payment of pensions to individual members of the United Mine Workers of America, and to employees of the coal operators signatory to the National Bituminous Coal Wage Agreement of 1950 (hereinafter referred to as the "1950 Agreement"), other than those exempted from the 1950 Agreement; and

WHEREAS, the Trustees desire to authorize the continuation of pension payments of ONE HUNDRED DOLLARS ($100.00) per month to pensioners whose applications have heretofore been approved by the Trustees of this Fund, or by Trustees of the 1947 Fund, and to adopt regulations to govern the payment of pensions hereafter;

NOW THEREFORE BE IT RESOLVED, that the Director be and is hereby authorized to continue payment of ONE HUNDRED DOLLARS ($100.00) per month to pensioners whose applications have heretofore been approved by the Trustees of this Fund, or by the Trustees of the 1947 Fund, in full force and effect, subject to Paragraphs III and IV of the regulations hereinafter provided, and shall be subject to amendment, revocation and revision at the discretion of the Trustees.

BE IT FURTHER RESOLVED, that effective January 29, 1953, the following regulations shall govern the payment of pensions of United Mine Workers of America, and to employees of the coal operators signatory to the 1950 Agreement other than those exempted from said Agreement, and shall be subject to amendment, revocation and revision at the discretion of the Trustees.

I. ELIGIBILITY

An applicant shall be eligible for a pension if he has:

A. Attained the age of sixty (60) years or over at the time of his application for pension.

B. Completed twenty (20) years service in the coal industry in the United States, its possessions or territories, or the Dominion of Canada within the twenty-five (25) year period immediately preceding his application for pension; a year of service being one for which the applicant has:

1. Worked in a job classified in any National Coal Wage Agreement for an employer in the Coal Industry.

2. Rendered service as an employee of the United Mine Workers of America in the Coal Industry and is not eligible for a pension under the United Mine Workers of America pension or retirement plan.

3. Served in the military service of the United States in any war or national emergency.

C. Retired from or ceased work in the Bituminous Coal Industry after May 28, 1946, following a period of regular employment in the Coal Industry immediately preceding May 29, 1946; provided that if he had retired from or ceased working in the Bituminous Coal Industry prior to May 29, 1946, he shall be eligible for a pension

only upon the completion of twenty (20) years service in the Bituminous Coal Industry, and meets the other requirement of eligibility as contained in Paragraphs A and B and its subsections, subsequnt to May 28, 1946.

II. Proof of Eligibility

A. Age

1. Wherever possible the age applicant will be verified by the Social Security Administration records.

2. Applicant shall be required to submit documentary evidence of probative value to establish his age in cases where the Social Security Administration records do not verify his age as stated on the application for pension.

B. Service

1. The following shall be deemed satisfactory proof of service for the period or periods covered therein:

a. Certification by a Local Union or by Local Unions, or by Districts of the United Mine Workers of America that an applicant served in the Coal Industry.

b. Statements by persons who have personal knowledge of applicant's service in the Coal Industry.

c. Certified copy of a photostatic copy of discharge from a branch of the Defense Department of the United States or statements from the appropriate branch of the Defense Department.

d. Any other proofs requested by, or satisfactory to, the Fund.

C. The burden of proving eligibility shall be on the applicant, and the proof submitted shall be acceptable to the Fund.

III. Payments

A. General

Payments to pensioners shall be as follows:

1. First payment shall be for the first month after authorization of pension.

2. Last payment shall be for the month in which pensioner dies.

3. Payments shall be payable on the first day of each month at pensioner's last address of record.

B. Suspension.

No payment shall be made for any month in which pensioner:

1. Does not reside within the continental limits of the United States, its territories or possessions, or the Dominion of Canada.

2. Performs compensated services for an employer in the coal industry or receives income, revenue, emolument, proceeds, gift or return from the Coal Industry either directly or indirectly.

3. Fails to continue to meet requirements of eligibility.

IV. False Statements

Any person who knowingly and willfully falsifies any records or makes any false representations or statements or withholds any information in order to secure a pension for himself or for any other person or to continue to receive a pension from the Fund

for himself or for any other person shall be barred from receiving any benefits from the Fund; and in any case where payment has been made as a result of such misrepresentations or omissions the individual involved will be required to reimburse the Fund in the amount he received from the Fund.

BE IT FURTHER RESOLVED, that the Director is hereby authorized and directed to activate this Resolution in accordance with its terms and conditions and is empowered to do all things, to perform all necessary acts, and to require the submission of evidence in order to effectuate the purposes of this Resolution.

TWENTY-SECOND MEETING OF THE BOARD OF TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA WELFARE & RETIREMENT FUND OF 1950, MARCH 13, 1953

Resolution No. 31

PENSION

BE IT RESOLVED, That the words and figures "twenty-five (25)" appearing in the fourth line of Paragraph 1 B of Resolution No. 30 be stricken and in lieu thereof the words the figures "thirty (30)" be inserted, to be effective as of January 29, 1953.

BE IT FURTHER RESOLVED, That Resolution No. 30 in all other respects remains unchanged and is in full force and effect.

Twenty-Third Meeting of the Board of Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950, May 12, 1953.

Excerpt from the "Douglas Committee Report"

(A). PENSIONS

The fund pays pensions of $100 a month to retired miners. The present major eligibility provisions are that the applicant must (1) be 60 years of age or over at the time of filing his application; (2) have completed 20 years of service in a classified job, i.e., a job subject to the collective bargaining agreement in the coal industry, during the 30 years immediately preceding his date of application; (3) have retired after May 29, 1946, the date the first fund was established, following regular employment in a classified job in the mine of an operator signatory to the agreement, and (4) have been regularly employed in a classified job in the coal industry immediately prior to the date the first fund was established. As of June 30, 1955, these pension payments were being received by 59,482 retired miners. Pensioners and their dependents are also eligible for hospital and medical care benefits.

An applicant may file for a pension either through his local union or directly at the Washington office of the fund. The information required of an applicant is extensive. The record of employment in the mines prior to 1937 must be validated by certificates of miners who worked with the applicant during the time shown or by affidavits of employers.

The application blank contains a space for certification by officials of the local union that the applicant is a member of the local and also a space for certification by an authorized representative of the U. M. W. district that the applicant is a member in good standing of the union. However, applications may be filed directly with the fund by miners not members of the union, and fund personnel state that applications are acted upon without reference to current union status.

In the past, various cases have come before the National Labor Relations Board against the United Mine Workers,

charging that the welfare and retirement plan was being administered solely for the benefit of UMW members in good standing, in violation of sections 8 (b)(1) and 8 (b)(2) of the Labor-Management Relations Act of 1947. Substantially all of these charges have been disposed of at the NLRB regional office level, either by dismissal, withdrawal, or settlement. Only one resulted in an unfair labor practice complaint proceedings. This case was thereafter closed upon voluntary compliance by the union. In this case, it was agreed that the contract executed March 5, 1950, provided for the consideration of applications for fund benefits regardless of whether or not the applicant was a union member.

Applications for pensions and for all other benefits are processed at the Washington office. If necessary, extensive investigations, including field visits, are made to determine whether or not the applicant meets the eligibility conditions set up by the board of trustees.

Applications which present close questions of eligibility, or for which required evidence has been unobtainable through correspondence, are taken up with the assistant to the director by the supervisor of the examining unit for joint review. If further consideration of the applicant's eligibility status is required, the assistant to the director then presents the application and entire file to a special review committee. The assistant to the director and an assistant comptroller serve on each of these special review committees, and one or more supervisors and senior examiners from the examining units, other than those previously examining the application, are assigned for service on these committees. If the special review committee, after full review of the application, reaches a unanimous decision as to the eligibility status of the applicant, action on it is taken accordingly.

During the fiscal year ending June 30, 1955, 7,061 applications for pensions were received. In the same year

there were 6,778 authorizations of pensions and 1,182 denials. Denials amounted to 16.7 percent of the number of applications received. The chief reasons for denial of pensions in this fiscal year were (1) the applicant furnished no proof of 20 years of classified service out of the last 30 years (406 cases); (2) there was no proof of classified employment immediately prior to May 1946 (384 cases); (3) the requested evidence was not submitted; (4) the applicant furnished no proof of age; and (5) the applicant was presently employed in the coal industry.

The subcommittee staff members reviewed illustrative cases of pension applications which had been approved or denied and a small random sample of cases approved for pensions. They were impressed with the businesslike way in which these applications were handled and by the care taken to see that applications were acted upon in accordance with fund eligibility requirements.

The subcommittee either directly or through referral from Senators had received over the past year some dozen letters from miners who were aggrieved because their applications for pensions had been denied. These cases were reviewed in detail with fund personnel. In every instance the denial of a pension was found to be in accordance with the eligibility requirements.

The eligibility conditions for pensions have been changed a number of times. An important change was made in 1953. Prior to this time, the essential eligibility conditions were that (1) the miner must be 60 years of age or older; (2) have retired after May 29, 1946; (3) have been employed in the industry in a classified job for a year preceding retirement, and (4) have had 20 years of service in classified jobs in the industry. In 1953 these conditions were changed to require that the 20 years of service must have been within the 30 years preceding retirement, and that the applicant must have been regularly employed in a classified job immediately prior to May 29, 1946.

These changes have caused a considerable number of persons to be denied pensions who would otherwise have been eligible under the former requirements. (As indicated above approximately a third of all denials in the 1955 fiscal year were on the ground that the applicant had not been employed in the industry immediately prior to inception of the fund.) The main reasons for these changes were that the fund was finding that many individuals who had retired or had left the industry prior to May 29, 1946, were obtaining temporary employment as miners only to qualify for pensions, and the mounting costs of the pension program required some tightening up of eligibility conditions.

Once a pension has been authorized, the pensioner continues to receive it each month until death, or until he resumes employment in the coal industry; its continuance is not affected by subsequent changes in eligibility conditions, and fund personnel state it is in no way contingent upon the pensioner retaining his membership in the United Mine Workers. However, pensioners as a group have no equity in the fund and their pensions could be reduced or eliminated if the financial condition of the fund necessitated.

The pension program is on a pay-as-you-go basis; there is no funding of benefits. The trustees representing the coal operators have on a number of occasions in the past voiced the opinion that the benefits should be funded, but Lewis and Miss Roche have thought otherwise.

Expenditures for pension benefits have increased steadily in the past 5 fiscal years, as shown in table 9, going from $42,473,000 in 1951 to $69,896,155 in 1955. Inasmuch as the program is relatively young, it may be expected that pension costs will continue to increase for a number of years before leveling off.

The total administrative costs allocable to the pension program are calculated by the subcommittee staff to be approximately 1.7 percent of total pension benefits paid.

29 USC, Section 186

Restrictions on payments to employee representatives; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds

"(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

"(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

"(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; or (5)

with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing

pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities."

* * *

"(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provision of section 17 of Title 15 and section 52 of this title, and the provisions of sections 101-110 and 113-115 of this title."

* * *

DISTRICT OF COLUMBIA CODE, TITLE 12 SECTION 301 [24:341]

Periods—Recovery of real property—Executor's or administrator's bond—Instruments under seal—Simple contract—Property damage—Statutory penalty or forfeiture—Certain torts—Actions not specified—Persons under disabilities.

No action shall be brought for the recovery of lands, tenements, or hereditaments after fifteen years from the time the right to maintain such action shall have accrued; nor on any executor's or administrator's bond after five years from the time of the right of action accrued thereon; nor on any other bond, or single bill, covenant, or other instrument under seal after twelve years after the accruing of the cause of action thereon; nor upon any simple contract, express or implied, or for the recovery of damages for any injury to real or personal property, or for the recovery of personal property or damages for its unlawful detention after three years from the time when the right to maintain any such action shall have accrued; nor for any statutory penalty or forfeiture, or for libel, slander, assault, battery, mayhem, wounding, malicious prosecution,

false arrest, or false imprisonment after one year from the time when the right to maintain any such action shall have accrued; and no action the limitation of which is not otherwise specially prescribed in this section shall be brought after three years from the time when the right to maintain such action shall have accrued: *Provided*, That if any person entitled to maintain any of the actions aforesaid shall be at the time of the accruing of such right of action under twenty-one years of age, non compos mentis, or imprisoned, such person or his proper representative shall be at liberty to bring such action within the respective times in this section limited after the removal of such disability, except that where any person entitled to maintain an action for the recovery of lands, tenements, or hereditaments, or upon any instrument under seal, shall be at the time such right of action shall accrue under any of the disabilities aforesaid, such person or his proper representative, except where otherwise provided herein, may bring such action within five years after the removal of such disability, and not thereafter. (Mar. 3, 1901, 31 Stat. 1389, ch. 854, § 1265; June 30, 1902, 32 Stat. 542, ch. 1329.)

[Filed July 9, 1963]

Before: Bazelon, Chief Judge, Wilbur K. Miller, Fahy, Washington, Danaher, Bastian, Burger, Wright and McGowan, Circuit Judges, in Chambers.

Order

On consideration of appellees' petition for rehearing en banc, and of appellant's answer thereto, it is

ORDERED by the court that the petition is hereby denied.

Per Curiam.

Dated: July 9, 1963